BRYAN N. JOHNSON

IBLA 74-91 Decided February 28, 1974

Appeal from decision by the Fairbanks District Office, Bureau of Land Management, rejecting color of title application, F-19516.

Affirmed.

Color or Claim of Title: Applications--Patents of Public Lands: Effect

A patent issued under authority of law vests title in the patentee and removes the land from the jurisdiction of this Department. A color of title application filed for such land must be rejected.

Patents of Public Lands: Generally--Patents of Public Lands: Suits to Cancel

The Department will not ordinarily recommend that the Attorney General start suit to cancel a patent unless (1) the Government has an interest in the remedy by reason of its interest in the land; (2) the interest of some party to whom the Government is under obligation has suffered by issuance of the patent; (3) the duty of the Government to the people so requires; or (4) significant equitable considerations are involved.

Color or Claim of Title: Generally--Color or Claim of Title: Applications

A color of title application must show that the land has been held under color or claim of title in good faith, peaceful, adverse possession for a period of twenty years under Class 1, or since January 1,

1901, under Class 2. No claim of lesser duration will suffice.

Color or Claim of Title: Generally--Color or Claim of Title: Good Faith

There can be no good faith adverse holding of land for twenty years where a predecessor in interest of the claimant during that period recognized the federal title to the land by filing therefor under the public land laws.

Color or Claim of Title: Generally

A will in which the testator merely devises "all my estate both real and personal," without reference to any specifically described property, does not constitute color of title to a tract of federal land (which the testator knew he did not own). Nor does a person who, serving as executor of the will, deeds the federal land to himself as a beneficiary under the will, establish color of title by such deed, since one cannot create his own title.

APPEARANCES: Bryan N. Johnson, pro se.

OPINION BY MR. FISHMAN

Bryan N. Johnson has appealed from a decision of the Fairbanks District Office, dated August 6, 1973, which rejected his color of title application, F- 19516. His application was filed pursuant to the Color of Title Act, as amended, 43 U.S.C. §§ 1068, 1068a-b (1970), and regulations, 43 CFR Subparts 2540-2541.

The decision below recited that: (1) on July 9, 1973, appellant filed a Class 1 color of title application for certain land; (2) "[t]he records show that the land involved was patented to the State of Alaska, Patent No. 50-67-0596, on June 30, 1967, under the Act of July 7, 1958 (72 Stat. 339), as amended;" and (3) "[t]herefore, as the land involved is not public domain and title rests with the State of Alaska, this application is hereby rejected."

Appellant asserts that: he filed a Class 2 color of title claim; the first cabin on the land was built prior to the 1907 Chena flood;

logs were salvaged from that cabin and a new cabin built which is still there; Tim Stanley and appellant built another cabin there in 1956; Mr. Bering (presumably the BLM cadastral engineer) "* * * should have been able to locate Jim Stanley's homestead for survey * * *;" and "[t]his property should never have been given to the State as land office knew of these cabins and also knew the owner of them."

James Stanley filed a notice of location for the land in issue on August 24, 1953, as a homestead settlement and made subsequent filings. Stanley died and devised all his property, both real and personal, to appellant, who, in his capacity as executor of the will, conveyed to himself in his individual capacity the decedent's interest in the lands in issue on October 30, 1969. Appellant's color of title application was filed July 9, 1973. We now turn to the holding of the decision below.

It stated that the land involved is not public domain, since it was patented to the State on June 30, 1967, and that appellant "* * * should look to the State of Alaska towards obtaining title to the land he desires." In essence, the decision properly held that the Department has no jurisdiction over lands for which patent has issued, since the patentee is vested with the title. Norman M. Rehg, Sr., 13 IBLA 191 (1973); Hallie Griffin, 13 IBLA 38 (1973); Clarence E. Leseberg, 12 IBLA 189 (1973); Dorothy H. Marsh, 9 IBLA 113 (1973); Everett Elvin Tibbets, 61 I.D. 397 (1954).

In the circumstances, the Department's sole function is to consider whether it should recommend to the Attorney General that suit be brought to cancel the patent. Charles Kik, A-27872 (December 1, 1959). The Department will not ordinarily recommend that the Attorney General start suit to cancel a patent unless (1) the Government has an interest in the remedy by reason of its interest in the land; (2) the interest of some party to whom the Government is under obligation has suffered by issuance of the patent; (3) the duty of the Government to the people so requires; or (4) significant equitable considerations are involved. Dorothy H. Marsh, supra. If appellant had a valid claim under the public land laws, his case conceivably could fall within category (2). None of the other categories is involved here. We proceed to consider whether appellant had such a valid claim.

As explained below, it makes no difference whether appellant's application was a Class 1 or Class 2 color of title. A color of title claimant must show that the land has been held under claim or color of title in good faith, peaceful, adverse possession for a period of twenty years under Class 1, or since January 1, 1901, under Class 2. No claim of lesser duration will suffice. Lena A. Warner,

11 IBLA 102 (1973). The instrument of title upon which appellant relies, the will, is dated October 30, 1969, and makes no reference to this specific land. The will merely devises to Johnson "all my estate both real and personal." This cannot constitute color of title to a specific tract of federal land. See Elsie V. Farington, 9 IBLA 191 (1973); aff'd on other grounds, Civil No. S-1250 (E.D. Calif., Dec. 5, 1973). Appellant's predecessor in interest recognized the federal title by filing the notice of location. Hence there was no good faith adverse holding for 20 years. Dennis v. Jean, A-20899 (July 24, 1937), citing Deffeback v. Hawke, 115 U.S. 392 (1885). Moreover, appellant's claim must rest upon the will rather than upon the executor's deed which he executed. As was pointed out in Pacific Coast Co. v. James, 5 Alaska 180, aff'd, 234 F. 595 (9th Cir. 1916), "[o]ne cannot make his own title." It follows that appellant did not have a viable color of title claim.

Nor do we find, as explained below, that appellant had any cognizable claim to the land under the public land laws. Stanley's devise to appellant was ineffective to transfer settlement rights. Kennecott Copper Corp., 8 IBLA 21, 32, 79 I.D. 636, 641 (1972), citing Tarpey v. Madsen, 178 U.S. 215, 221 (1900). Nor can any recognition be given to such occupancy of the land as appellant may have had, since it does not appear that he filed a notice of location under section 5 of the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1970). Kennecott Copper Corp., supra. In sum, we find no basis for concluding that appellant had any cognizable claim to the lands under the public land laws. In the circumstances, we find no justification which would warrant the Department recommending to the Attorney General that suit be brought to cancel the patent issued to the State of Alaska. But cf. Atherton v. Fowler, 96 U.S. 513 (1877).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman, Member

We concur:

Anne Poindexter Lewis, Member

Edward W. Stuebing, Member